RECORD AND BRIEFS

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No. 16-369

# In the Supreme Court of the United States

LOS ANGELES COUNTY, CALIFORNIA, ET AL.,
PETITIONERS

*v.*

ANGEL MENDEZ, ET AL.

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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## QUESTIONS PRESENTED

1. Whether the Ninth Circuit correctly imposed damages liability for a police use of force that was constitutionally reasonable at the moment that it occurred, on the theory that the police provoked the situation that led to the use of force.

2. Whether the Ninth Circuit correctly concluded that the police officers' warrantless entry into a home proximately caused respondents' injuries from a later police use of force.

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## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

### INTEREST OF THE UNITED STATES

This case presents questions about whether law enforcement officers who shot a man pointing a gun at them may be liable for damages from the shooting under 42 U.S.C. 1983—not because the officers' use of force was excessive, but because the officers violated clearly established law by entering the man's home without a warrant. The Fourth Amendment applies to both state and federal law enforcement officers, and the qualified immunity principles applicable under Section 1983 also apply in civil actions against federal officials under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Further, the United States prosecutes excessive-force cases under 18 U.S.C. 242. The United States there-

fore has a substantial interest in the Court's disposition of this case.

## STATEMENT

1. On October 1, 2010, police officers in Los Angeles were searching a neighborhood for Ronnie O'Dell, a wanted parolee. Pet. App. 3a, 56a. O'Dell was a felony suspect classified as armed and dangerous, and the police had a warrant for his arrest. *Id.* at 3a, 57a; J.A. 74. O'Dell had previously evaded officers' attempts to arrest him. Pet. App. 57a.

The police received a tip that O'Dell had been spotted in front of a home belonging to Paula Hughes. Pet. App. 4a. Officers met to develop a plan before proceeding to the house. *Ibid.* They decided that some of them would approach the front door of the house and attempt to speak with Hughes, while others would go to the backyard to cover the back door and conduct a security sweep. *Id.* at 4a, 59a. Deputy Christopher Conley and Deputy Jennifer Pederson (petitioners in this Court) were assigned to the back of the house. *Id.* at 4a. At the briefing, officers were told that a man and woman stayed in a shed in the backyard. *Id.* at 4a, 59a-60a; J.A. 110, 212. Only Deputy Pederson (and not Deputy Conley) heard this announcement. Pet. App. 59a; J.A. 173.

The police arrived at the Hughes residence, and Deputy Conley and Deputy Pederson went to the backyard. Pet. App. 4a. The backyard was filled with refuse and debris, including abandoned automobiles and other equipment. *Id.* at 60a; J.A. 78-79, 81-83. It also contained three metal storage sheds and a plywood shack. Pet. App. 60a.

Deputy Conley and Deputy Pederson entered the backyard with their guns drawn because they believed

O'Dell to be armed and dangerous. Pet. App. 65a. They checked the three metal storage sheds for O'Dell and did not find him. *Ibid.* The officers then approached the shack. *Id.* at 66a. The shack was 7 feet by 7 feet by 7 feet and was covered by a blue tarp. *Id.* at 5a, 61a. It had a single entrance (without a lock) and no windows, and there was a storage locker in front of it and debris all around it. *Ibid.*; J.A. 82, 87, 102. There was an air conditioner on the side of the shack, but the officers could not see it from where they were standing. Pet. App. 62a, 66a; J.A. 81, 216. The officers "did not perceive the shack to be a habitable structure," but they thought O'Dell might be hiding in it. Pet. App. 66a-67a; J.A. 175-176, 215-216.

Deputy Conley opened the door to the shack, with Deputy Pederson behind him. Pet. App. 5a; J.A. 177. Deputy Conley pushed back a blue blanket hanging from the top of the door frame. Pet. App. 5a, 67a. As he did so, the officers saw the silhouette of an adult man holding a gun. *Id.* at 67a. The gun "closely resembled a small caliber rifle," and it was pointed towards the officers. *Id.* at 62a, 69a.

"Almost immediately" Deputy Conley yelled, "Gun!" Pet. App. 69a. The officers, "fearing that they would be shot and killed," fired their weapons at the man while backing out of the shack. *Id.* at 69a-70a. The officers' shots hit the man, respondent Angel Mendez, and his girlfriend, respondent Jennifer Garcia, who was behind him in the shack. *Id.* at 70a. Mendez and Garcia were severely injured. *Ibid.*

The shooting was a tragic mistake. Mendez and Garcia had been living in the shack and were napping at the time of the entry; Mendez had picked up the gun to move it, not to shoot at the officers; and the

gun was a BB gun, not a small caliber rifle. Pet. App. 5a-6a, 67a-68a.

2. Respondents sued Los Angeles County, Deputy Conley, and Deputy Pederson in federal court under 42 U.S.C. 1983, alleging that the officers violated their Fourth Amendment rights. Pet. App. 6a, 72a. Following a bench trial, the district court denied qualified immunity, found the officers personally liable for Fourth Amendment violations, and awarded over $4 million in damages. *Id.* at 55a-136a.

The district court first concluded that, although the officers had probable cause to search the shack, they violated clearly established law in entering the shack without a warrant and without knocking and announcing their presence. Pet. App. 66a, 78a-105a. Although the officers both testified that they believed the shack to be uninhabitable, *id.* at 66a; J.A. 175-176, 215-216, the court thought they should have realized "that the shack was a separate residence being used by third parties" and therefore should have treated it as a "separate residential unit" for Fourth Amendment purposes, Pet. App. 85a, 102a. The court awarded only nominal damages for the officers' unlawful entry into the shack. *Id.* at 135a.

The district court then considered whether the police violated clearly established Fourth Amendment law in shooting respondents. Pet. App. 106a-127a. The court first determined that, "at the moment of shooting," the officers' use of deadly force was justified. *Id.* at 108a. The court explained that "Deputies Conley and Pederson's use of force was reasonable given their belief that a man was holding a firearm rifle threatening their lives." *Ibid.*

The district court nevertheless found the officers liable for the shooting based on the Ninth Circuit's "provocation" doctrine. Pet. App. 109a-127a (relying on *Billington* v. *Smith*, 292 F.3d 1177, 1189 (9th Cir. 2002)). The court reasoned that the officers "'provoked' Mr. Mendez's response" by entering the shack without obtaining a warrant or knocking and announcing their presence. *Id.* at 109a, 112a, 118a. The court also concluded that liability was appropriate because it was "foreseeable" that the officers' unlawful entry into the shack "could lead to a violent confrontation." *Id.* at 124a-126a. The provocation theory was the sole basis for the $4 million damages award. *Id.* at 135a-136a.

3. The court of appeals affirmed in pertinent part. Pet. App. 1a-26a. The court first determined that the officers' entry into the shack violated clearly established law—but only because the officers entered the shack without a warrant, and not because they failed to knock and announce their presence at the time of entry. *Id.* at 18a, 20a. The court then found the officers liable for damages from the shooting using the circuit's "provocation" doctrine. *Id.* at 22a. The court did not question the district court's holding that "the deputies' shooting of [respondents] was not excessive force under *Graham v. Connor*, 490 U.S. 386 (1989)." *Ibid.* Instead, the court found the officers liable for respondents' injuries from the shooting because the officers' entry into the shack "created a situation which led to the shooting and required the officers to use force." *Ibid.* (quoting *Espinosa* v. *City & Cnty. of S.F.*, 598 F.3d 528, 539 (9th Cir. 2010), cert. denied, 132 S. Ct. 1089 (2012)).

In the alternative, the court held that the officers "are liable for the shooting under basic notions of proximate cause" because "the situation in this case, where Mendez was holding a gun when the officers barged into the shack unannounced, was reasonably foreseeable." Pet. App. 24a-25a.

## SUMMARY OF ARGUMENT

The Ninth Circuit erred in holding the officers liable for damages based on a police shooting that was reasonable at the moment it occurred. Neither the court's provocation theory nor its proximate-cause analysis justifies the personal liability it imposed.

I. The first question in this case is whether the Ninth Circuit correctly imposed personal liability on the view that the officers used excessive force, in violation of clearly established Fourth Amendment law, because they created the situation that led to the shooting. A claim of excessive force is properly analyzed under *Graham* v. *Connor*, 490 U.S. 386 (1989), and the qualified immunity doctrine protects officers against damages liability for Fourth Amendment violations unless the unlawfulness of the officers' actions is beyond debate. In this case, all agree that the officers' use of force was justified under *Graham* because the officers reasonably feared for their lives when Mendez pointed a gun at them. That should have been the end of the matter with respect to the question whether the shooting was constitutional.

Instead, the courts below found the officers personally liable under the Ninth Circuit's "provocation" doctrine. Under that doctrine, a reasonable use of force is deemed unreasonable because the police "created [the] situation" that led to the shooting. Pet. App. 22a (quoting *Espinosa* v. *City & Cnty. of S.F.*,

598 F.3d 528, 539 (9th Cir. 2010), cert. denied, 132 S. Ct. 1089 (2012)). That doctrine is wrong. Under *Graham*, a reasonable use of force does not become excessive because of a constitutional violation in the events leading up to the encounter. And such an open-ended inquiry skews incentives for the police, creates uncertainty, and erodes qualified immunity. This Court should reject it.

II. The second question is whether the Ninth Circuit correctly held that the officers' warrantless entry into the shack proximately caused respondents' injuries from the shooting. Tort-law causation principles apply in cases under 42 U.S.C. 1983. Under those principles, officers may in certain circumstances be held liable for damages that proximately resulted from constitutional violations so long as no superseding cause cuts off liability. The question whether a police action proximately caused certain damages depends on, *inter alia*, whether the damages were reasonably foreseeable and within the scope of the risk of the initial action.

The Ninth Circuit erred in holding that the warrantless entry here (which it concluded was unlawful) proximately caused the damages from the shooting. Without the provocation theory, the only potential violation of respondents' constitutional rights (which had to not only be a violation, but a clearly established violation) was the officers' entry into the shack without a warrant. But as the court of appeals recognized, the proximate cause of the shooting was the officers' failure to knock and announce their presence, Pet. App. 22a—not the lack of a warrant. Because the officers were entitled to qualified immunity for that failure to knock and announce, *id.* at 18a, they cannot be held personally liable for the injuries caused by it.

The judgment of the court of appeals should be reversed.

## ARGUMENT

### I. THE NINTH CIRCUIT ERRED IN IMPOSING LIABILITY AND DAMAGES FOR THE OFFICERS' SHOOTING ON A "PROVOCATION" THEORY

#### A. The Fourth Amendment Excessive-Force Claim Should Be Analyzed Under *Graham* v. *Connor* Through The Lens Of Qualified Immunity

1. A claim that the police used excessive force during an investigation or arrest is properly analyzed as a claim for violation of the Fourth Amendment's prohibition on unreasonable seizures. See *Graham* v. *Connor*, 490 U.S. 386, 395 (1989); *Tennessee* v. *Garner*, 471 U.S. 1, 7-8 (1985). The Fourth Amendment question is whether the officer acted reasonably in using the force. *Graham*, 490 U.S. at 396. The reasonableness inquiry is an objective one; it does not depend on the officer's "underlying intent and motivation." *Id.* at 397; see, *e.g.*, *Ashcroft* v. *al-Kidd*, 563 U.S. 731, 736 (2011).

The reasonableness of a use of force depends on "the facts and circumstances of each particular case," including the severity of the crime at issue, whether the suspect is actively resisting arrest or attempting to flee, and, most importantly, "whether the suspect poses an immediate threat to the safety of the officers or others." *Graham*, 490 U.S. at 396. Reasonableness is judged "at the moment" force is used, and from "the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Ibid.*

In applying the reasonableness standard, courts must provide "allowance for the fact that police offic-

ers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 396-397. The Court has warned that, in determining what is reasonable, "judges should be cautious about second-guessing a police officer's assessment, made on the scene, of the danger presented by a particular situation." *Ryburn* v. *Huff*, 132 S. Ct. 987, 991-992 (2012) (per curiam).

2. The Fourth Amendment excessive-force question here arises in the context of a lawsuit against state officers under 42 U.S.C. 1983, where the qualified immunity doctrine applies. See *Filarsky* v. *Delia*, 132 S. Ct. 1657, 1661-1662 (2012). Qualified immunity shields officers from suit unless their actions violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). This doctrine ensures that "fear of liability will not unduly inhibit officials in the discharge of their duties." *Camreta* v. *Greene*, 563 U.S. 692, 705 (2011) (citation and internal quotation marks omitted).

Law is "clearly established" when it is so clear that "every reasonable official would [have understood] that what he is doing violates that right." *Reichle* v. *Howards*, 132 S. Ct. 2088, 2093 (2012) (citations and internal quotation marks omitted; brackets in original). The clearly established law must be "particularized to the facts of the case," so that the legal question before the officers was "beyond debate." *White* v. *Pauly*, No. 16-67 (Jan. 9, 2017), slip op. 4, 6 (per curiam) (citations and internal quotation marks omitted). And "[t]he inquiries for qualified immunity and exces-

sive force remain distinct." *Saucier* v. *Katz*, 533 U.S. 194, 204 (2001). Thus, in this case, even if the officers acted unreasonably in shooting respondents (and they did not), they are still shielded from personal liability unless existing law made clear, through cases with facts sufficiently close to these, that it was "beyond debate" that the officers could not use force to respond to the apparent threat they faced in the shack.

### B. Under *Graham*, The Officers Here Did Not Violate The Fourth Amendment

The officers' use of force in this case was reasonable under the circumstances, and it therefore was constitutional under the Fourth Amendment.

The "crucial question" is whether Deputy Conley and Deputy Pederson "acted reasonably in the particular circumstances that [they] faced." *Plumhoff* v. *Rickard*, 134 S. Ct. 2012, 2023 (2014). Here are the circumstances: Deputy Conley and Deputy Pederson had been looking for a wanted parolee. Pet. App. 57a. They had probable cause to believe he was in Hughes's backyard, and they thought he might be in one of the storage sheds or in the shack. *Id.* at 66a-67a, 93a. The officers had their guns drawn because they "believed [O'Dell] to be armed and dangerous." *Id.* at 65a. After checking the storage sheds and not finding O'Dell, the officers approached the shack. *Id.* at 65a-67a. As Deputy Conley opened the door to the shack and pulled back the curtain, he was confronted by a man pointing a gun at him. J.A. 99. The gun was "approximately a foot or two feet away from [Deputy Conley's] face." J.A. 103. In that moment, the officers both believed that they were going to be killed. See J.A. 179 (Deputy Conley: "I thought to myself, This is where I'm going to die."); J.A. 217 (Deputy

Pederson: The man in the shack "w[as] going to shoot us, and possibly kill one or both of us.").

The officers' decision to use deadly force to neutralize a perceived threat to their lives was objectively reasonable. When Deputy Conley opened the door of the shack and saw a man with a gun, the officers "*reasonably* believed" that Mendez "threatened their lives." Pet. App. 69a. "Deputies Conley and Pederson's use of force was reasonable given their belief that a man was holding a firearm rifle threatening their lives." *Id.* at 108a. Although the officers' use of force risked significant injuries to respondents, that injury was counterbalanced by the officers' interest in preserving their own lives. See *Garner*, 471 U.S. at 11 (police may use deadly force when they face "a threat of serious physical harm").

The officers' mistaken belief about the type of gun pointed at them does not make their split-second decision to use force unreasonable. Although the gun turned out to be a BB gun, the officers' belief that it was a loaded weapon was reasonable because "[t]he BB gun rifle closely resembled a small caliber rifle." Pet. App. 62a; see *id.* at 69a ("Deputies Conley and Pederson *reasonably* believed that the BB gun was a firearm rifle."). Further, the officers did not act unreasonably in shooting rather than using a verbal warning. Although the Fourth Amendment does not require officers to use the least intrusive alternative, see *Wilkinson* v. *Torres*, 610 F.3d 546, 551 (9th Cir. 2010), cert. denied, 562 U.S. 1219 (2011), here the officers reasonably believed that they had no less intrusive option available because of the immediacy of the threat, J.A. 179-180.

Accordingly, the officers did not violate the Fourth Amendment in shooting respondents, let alone commit the type of clearly established constitutional violation that could justify personal liability. Indeed, everyone in this case recognized that there could be no liability under a straightforward application of *Graham*. The district court so found, Pet. App. 69a, 108a, and the court of appeals did not disagree, *id.* at 22a, 25a. Respondents themselves have conceded that the use of force was reasonable under *Graham*. *Id.* at 108a. "If the only issue in the case was simply what occurred at the moment of the shooting, then the verdict would have been in favor of the defendants." J.A. 237.

### C. The Ninth Circuit Decided This Case Based On Its Provocation Doctrine, In Which A Reasonable Use Of Force Is Deemed Unreasonable Because Of A Prior Constitutional Violation

1. Although the officers' use of force was reasonable and therefore constitutional at the moment it occurred, the courts below deemed it unreasonable and unconstitutional based on the Ninth Circuit's "provocation" doctrine. Pet. App. 22a-25a, 109a-122a. That doctrine holds officers liable under the Fourth Amendment for a reasonable use of force when the court believes that the officers "created [the] situation" that "required the officers to use force." *Espinosa* v. *City & Cnty. of S.F.*, 598 F.3d 528, 539 (9th Cir. 2010), cert. denied, 132 S. Ct. 1089 (2012). Although the precise contours of the doctrine are somewhat unclear (see pp. 23-24, *infra*), what is clear is its effect: it holds officers liable under the Fourth Amendment for using excessive force even though the use of force was objectively reasonable at the moment it was employed. As the Ninth Circuit put it, an officer's "provocation"

of a situation that requires use of police force "render[s] the officer's otherwise *reasonable* defensive use of force *unreasonable* as a matter of law." *Billington* v. *Smith*, 292 F.3d 1177, 1190-1191 (2002).

2. The "provocation" doctrine originated in *Alexander* v. *City & County of San Francisco*, 29 F.3d 1355 (9th Cir. 1994), cert. denied, 513 U.S. 1083 (1995). In that case, the police shot a man in his house while executing an administrative warrant. The man came to the City's attention because sewage was seeping from his house onto the street, a foul odor was coming from the house, and the backyard was filled with trash. *Id.* at 1357. Over the course of a month, the City attempted to contact the man: Health Department officials went to the house and knocked on the door; the City sent letters and summoned him to nuisance abatement hearings; and the Health Department obtained an administrative warrant to enter the home, which it mailed to him. *Ibid.* No one responded. *Id.* at 1357-1358. The City obtained a second administrative warrant, one that specifically authorized "forcible entry." *Id.* at 1358. When public health officials went to execute the warrant, they brought the police because they had learned that the occupant was mentally unstable. *Ibid.* They arrived at the house, and the occupant called out to them, "I'm going to get my gun and use it." *Ibid.* City officials, including a hostage negotiator, tried to talk with the man for about an hour; after that failed, a tactical team forced entry into the home. *Ibid.* The man inside pointed a gun at them. *Ibid.* The police ordered him to put the gun down; instead, he said, "I told you I was going to use it," and pulled the trigger. *Ibid.* The officers shot back, killing the man. *Ibid.*

The Ninth Circuit held the police officers could be liable for using excessive force—not because the police acted unreasonably in shooting the man when he pointed a gun at them, but because they "creat[ed] the situation which caused [the man] to take the actions he did." *Alexander*, 29 F.3d at 1366. The court's theory of liability turned on "the force the officers used in entering the house, not the force they used or didn't use once they had entered." *Id.* at 1366 n.12. In the court's view, if the purpose of the entry was to assist in an inspection, then the jury could find that use of a tactical team in the initial entry was excessive and could hold the police liable for the later shooting under *Graham*. *Id.* at 1366-1367.

3. After a series of cases in which the Ninth Circuit attempted to define the contours of the provocation doctrine, the court summarized the doctrine in *Billington*. In that case, an off-duty police officer was passed by a car that was speeding and swerving and "almost had a head-on collision with an approaching car." 292 F.3d at 1180. The officer turned on his police lights and gave chase, and the car crashed into a curb. *Ibid.* When the officer went to the car to render first aid, the driver put the car in gear and tried to flee, but the car had been too damaged to move. *Id.* at 1180-1181. The driver, who was drunk, hit the officer and grabbed him by the throat and by the tie. *Ibid.* The officer tried to back away, but the driver climbed out the car window, hanging on to the officer. *Id.* at 1181. The struggle continued, and when the driver grabbed the barrel of the officer's gun, the officer fired and killed the driver. *Ibid.*

The district court found the officer liable for damages using the Ninth Circuit's "provocation" theory.

*Billington*, 292 F.3d at 1185-1186. The Ninth Circuit reaffirmed that theory and restated it as follows: "[W]here an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, he may be held liable for his otherwise defensive use of deadly force." *Id.* at 1189. As in *Alexander*, the court focused not on whether force was justified at the moment it was employed, but on whether the police officer made earlier "tactical errors" that "made his reasonable use of force at that moment unreasonable." *Id.* at 1185. If the officer made such errors, then he would be liable for injuries caused from the use of force, even though the use of force was reasonable at the time. *Id.* at 1190-1191. The court justified its provocation doctrine with the explanation that "[the officer] shouldn't have gotten himself into the situation, so he couldn't constitutionally shoot his way out of it." *Id.* at 1185-1186. The court concluded, however, that the officer in that case was not liable under the provocation theory because he had not committed any initial constitutional violation. *Id.* at 1191.

4. The Ninth Circuit has applied its provocation doctrine in a number of decisions, including the decision under review here. In *Espinosa*, the court upheld the denial of summary judgment to officers who entered a house they believed was being used for drug sales and then shot and killed a person in the attic. 598 F.3d at 532-533. The court separately analyzed whether the officers acted reasonably at the moment of the shooting and whether they should nonetheless be liable for causing the situation that led to the shooting because they lacked justification to enter the house. *Id.* at 537-539. As the court explained, the

police would be liable under the provocation doctrine if their "illegal entry created a situation which led to the shooting and required the officers to use force that might have otherwise been reasonable." *Id.* at 539. The court remanded so a jury could decide whether the police "intentionally or recklessly provoked a confrontation with" the victim. *Ibid.*

In *Sheehan* v. *City & County of San Francisco*, 743 F.3d 1211 (9th Cir. 2014), rev'd, 135 S. Ct. 1765 (2015), officers were summoned to assist with the involuntary commitment of an armed, mentally ill woman who was living in a group home. *Id.* at 1217-1218. After the woman retreated into her room, the officers forcibly reentered the room, leading to a confrontation that ended in the non-fatal shooting of the woman. *Id.* at 1219-1220. The Ninth Circuit held that the "use of deadly force—*viewed from the standpoint of the moment of the shooting*—was reasonable as a matter of law," *id.* at 1229, but nonetheless stated that "the events leading up to the shooting" could render the use of force unreasonable, *id.* at 1230. The court remanded to allow a jury to consider "whether the shooting was unreasonable on a provocation theory." *Ibid.* This Court reversed on qualified immunity grounds, *City & Cnty. of S.F.* v. *Sheehan*, 135 S. Ct. 1775, 1776-1778 (2015), and in doing so, it noted that the provocation doctrine had been "sharply questioned" by other circuits, *id.* at 1776 n.4.

In the decision below, the Ninth Circuit, relying on *Billington* and *Espinosa*, held Deputy Conley and Deputy Pederson personally liable for over $4 million in damages using the provocation doctrine. Respondents' "entire theory of the case * * * [wa]s premised upon the law of Fourth Amendment provocation." Pet.

App. 109a. The court did not find a *Graham* violation in the officers' decision to use force; instead, it used the officers' failure to secure a warrant as a reason to deem the later use of force unreasonable. *Id.* at 22a. In the court's view, the officers "created a situation which led to the shooting" and so "liability was proper." *Ibid.* (citation omitted). Although *Billington* required the court to find that the officers acted "intentionally or recklessly" in "provo[king]" the use of force, the court deemed that requirement satisfied by the court's conclusion that it was clearly established that the officers needed a warrant to enter the shack. *Id.* at 23a. The result is that the court imposed personal liability on an excessive-force theory based only on a different clearly established constitutional violation.

### D. The Ninth Circuit's Provocation Theory Is Wrong And Ill-Advised

1. The Ninth Circuit's provocation doctrine is inconsistent with *Graham*. The defining feature of the doctrine is that it imposes Fourth Amendment liability, on an excessive-force theory, for a constitutionally reasonable use of force. That is, the doctrine uses an initial constitutional violation by law enforcement (such as an unlawful entry) to transform an "otherwise *reasonable* defensive use of force"—meaning a use of force that would, in itself, satisfy the Fourth Amendment under *Graham*—into unreasonable force. *Billington*, 292 F.3d at 1190-1191. That is directly contrary to *Graham*, which teaches that whether a police use of force is constitutional depends on whether the officer's decision is objectively reasonable at the moment the officer used the force. 490 U.S. at 396-397. If the use of force is justified at that moment (say, because a

suspect is threatening the officer with a gun), then the officer did not use excessive force and the shooting does not violate the Fourth Amendment. *Id.* at 396.

The provocation doctrine starts with the understanding that the officer's use of force was a reasonable response to a perceived threat, but then expands the inquiry to consider whether something else the officer did would justify liability on an excessive-force theory. If the court finds "provocation" in an officer's earlier actions, then the Ninth Circuit deems the "*reasonable* defensive use of force *unreasonable* as a matter of law." *Billington*, 292 F.3d at 1190-1191. The effect of this doctrine is that, once an officer commits a constitutional violation that brings him into contact with a suspect, *any* use of force that ensues may be deemed unreasonable, even if that use of force is reasonable under *Graham*. But the use of force that is reasonable under *Graham* does not become unreasonable because of earlier events that initiated the interactions with the suspect. If the police committed an "independent constitutional violation" (*id.* at 1190) in some earlier action, then a court should analyze liability and damages for that action. See pp. 26-30, *infra*. It cannot use the earlier action to transform a reasonable use of force into a constitutional violation.

The provocation doctrine also focuses on the wrong point in time. *Graham* set out a "reasonableness at the moment" standard. 490 U.S. at 396; see, *e.g.*, *Saucier*, 533 U.S. at 210 ("The proper perspective in judging an excessive force claim * * * is that of a reasonable officer on the scene and at the moment the force was employed.") (Ginsburg, J., concurring in the judgment) (citation and internal quotation marks omitted). That standard makes sense, because the judgment to

use force is often made in a "split-second," under "tense, uncertain, and rapidly evolving" circumstances. *Graham*, 490 U.S. at 397. But the provocation theory expands the time period and the range of police action relevant to assessing an officer's liability for the use of force, so that even if the use of force is reasonable "at the moment" it occurs, the officer could still be liable for that action. Not only is that approach legally wrong, but it places officers in an untenable position: At the moment that an officer is deciding whether to use force, particularly deadly force, he is focused on the immediate threat he is facing, not an earlier point in time. See J.A. 100, 113, 179.

Further, the provocation theory is inconsistent with this Court's decisions because it trains on the officers' subjective motivation. The provocation doctrine applies only where the officer "*intentionally* or *recklessly* provokes a violent confrontation." *Billington*, 292 F.3d at 1189 (emphasis added). As explained by the Ninth Circuit, this inquiry into mental state focuses on the officer's state of mind with respect to the initial constitutional violation (such as an illegal entry), not the use of force. *Id.* at 1190. Whether applied to the initial police action or the later use of force, the state-of-mind inquiry conflicts with the basic Fourth Amendment focus on objective factors. This Court has consistently held that Fourth Amendment liability does not turn on officers' subjective motivations. See *Whren* v. *United States*, 517 U.S. 806, 813-815 (1996); see also, *e.g.*, *Heien* v. *North Carolina*, 135 S. Ct. 530, 539 (2014); *Kentucky* v. *King*, 563 U.S. 452, 464 (2011); *Bond* v. *United States*, 529 U.S. 334, 338 n.2 (2000); *Graham*, 490 U.S. at 397. In particular, the Court has rejected the view that Fourth Amendment liability for

use of excessive force turns on whether the officer acted recklessly. See *Kingsley* v. *Hendrickson*, 135 S. Ct. 2466, 2476-2477 (2015).[1]

2. In cases involving the police pursuit of reckless drivers, the Court has rejected attempts to judge the reasonableness of an officer's use of force by scrutinizing the police conduct bringing about the need to use force. For example, in *Scott* v. *Harris*, 550 U.S. 372 (2007), the Court considered whether a police officer used excessive force in attempting to stop a high-speed car chase by bumping the fleeing suspect's car with his patrol car. *Id.* at 375. The Court recognized the "high likelihood" that the officer's maneuver would result in "serious injury or death" to the suspect, but found the maneuver justified because of the need to stop the chase and protect the officers and the public. *Id.* at 381-384. In so holding, the Court rejected the view that the police could have avoided the need to use force by "simply ceas[ing] their pursuit." *Id.* at 385. The Court explained that this would not guarantee that the suspect would cease his reckless actions. *Ibid.* And the Court was concerned about the "perverse incentives" created by "a rule requiring the police to allow fleeing suspects to get away whenever they drive *so recklessly* that they put other people's lives in danger." *Ibid.* The Court therefore rejected

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[1] Perhaps aware of the conundrum it has created, the Ninth Circuit in this case concluded that if an initial constitutional violation is so clear as to deny qualified immunity, then the officer necessarily acted intentionally or recklessly in provoking a use of force. Pet. App. 23a-24a. That reasoning confuses two separate questions (the state of the law and the officer's state of mind), and it shows that all the circuit requires to impose liability on a provocation theory is a clearly established constitutional violation in the events leading up to the use of force.

the idea that the Fourth Amendment "impose[s] this invitation to impunity-earned-by-recklessness." *Id.* at 385-386.

More recently, in *Plumhoff*, the Court considered the Fourth Amendment reasonableness of a police shooting that was intended to prevent a cornered suspect from resuming a dangerous high-speed chase. 134 S. Ct. at 2020-2022. In finding the officer's use of force reasonable, the Court reiterated that a Fourth Amendment violation cannot be predicated on the notion that the police created the danger by their decision to continue chasing the suspect. *Id.* at 2021 n.3. The district court had held that "the danger presented by a high-speed chase cannot justify the use of deadly force because that danger was caused by the officers' decision to continue the chase." *Ibid.* This Court rejected that reasoning as "irreconcilable with our decision in *Scott*." *Ibid.*

The Ninth Circuit imposes liability for a reasonable use of force if the police "created [the] situation" that "required the officers to use force." *Espinosa*, 598 F.3d at 539; see, *e.g.*, *Cunningham* v. *Gates*, 312 F.3d 1148, 1154 (9th Cir. 2002) (referring to the provocation doctrine as a "danger creation theory"), cert. denied, 538 U.S. 960 (2003). While the Ninth Circuit limits its provocation theory to uses of force following earlier constitutional violations, and the Court in *Scott* and *Plumhoff* examined uses of force that were not preceded by constitutional violations, the relevant point is that this Court declined to call into constitutional question a reasonable use of force because of actions that the police had taken that led up to the use of force.

3. The Ninth Circuit's provocation doctrine has severely negative consequences.

a. First and foremost, it punishes a police officer for a use of force that everyone agrees is reasonable. A police officer who is being threatened by a person with a gun must be able to defend himself. See *Sheehan*, 135 S. Ct. at 1775 ("Nothing in the Fourth Amendment bar[s] [officers] from protecting themselves."). And the police must be able to use force to protect the public from threats. See, *e.g.*, *Plumhoff*, 134 S. Ct. at 2022 (approving use of deadly force to neutralize "a grave public safety risk"). But the provocation doctrine tells police that they are less entitled to use force to defend themselves or others if the police have committed an earlier violation in the string of events leading up to the use of force. Although an officer facing the barrel of a gun likely would respond with force to save his own life regardless of the potential for damages liability, in a close case, the fear of personal liability could lead an officer to forgo use of force and allow a suspect's threat to officers or the public to persist. Cf. *Scott*, 550 U.S. at 385.

The provocation doctrine skews police incentives not only about the use of force, but about antecedent searches and seizures. Law enforcement officers often face dynamic situations calling for quick decisions on the legality of a warrantless entry or of a particular warrantless search or seizure. If an officer makes an incorrect decision, the provocation doctrine will hold him liable (absent a finding of qualified immunity) for any subsequent use of force, however justified in the circumstances. When the officer is liable for every use of force that may occur after an initial constitutional violation, it intensifies the uncertainty that the officer

faces when making a fast decision whether an entry or a search or seizure is justified.

b. The provocation doctrine is open-ended and ill-defined. The approach invites courts to look past established rules identifying certain conduct as reasonable (and thus lawful under the Fourth Amendment) and to engage instead in a standardless inquiry into whether an officer's earlier conduct might nevertheless be viewed as unreasonable in a more general way. And by expanding the inquiry from the moment the police used force to the entire interaction between the police and the suspect, the Ninth Circuit has invited close scrutiny of split-second police judgments based on prior events and actions. See *Alexander*, 29 F.3d at 1365 (police are held personally liable if they "did something wrong that resulted in [the man's] death"). The provocation doctrine removes the focus from the officers' justification at the time they used force and "converts members of the judicial branch of government into tactical managers of the police." *Id.* at 1377 (Trott, J., concurring in part and dissenting in part).

Although this Court has stressed the need to provide clear guidance to the police, see, *e.g.*, *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 347 (2001), the provocation doctrine creates great uncertainty. The Ninth Circuit's attempts to define the doctrine have done little to help the matter. Although the circuit has said that the police must "*provoke[]* a violent confrontation," *Billington*, 292 F.3d at 1189 (emphasis added), it is unclear whether any actual provocation is required, see Pet. App. 118a ("[T]he predicate constitutional violation (here, illegal entry) need not be menacing or 'provocative' in the sense of inciting a violent response."); see also *Espinosa*, 598 F.3d at 539 (ask-

ing whether the police "created a situation which led to the shooting").[2] Although the court of appeals has sometimes referred to proximate cause as an ingredient of the provocation doctrine, *Billington*, 292 F.3d at 1190, here it treated proximate cause as a separate, alternative legal theory, Pet. App. 24a-25a. And although the doctrine requires the police to act "intentionally or recklessly" in committing an initial constitutional violation, *Billington*, 292 F.3d at 1190, here the court of appeals did not require such proof, see Pet. App. 23a; p. 17, *supra*. As a result, it appears that all a court needs to find liability on a provocation theory is a prior constitutional violation leading to an encounter and a later use of force. See Pet. App. 22a-24a.

c. The provocation doctrine erodes the protections of qualified immunity. The doctrine makes it very difficult for an officer in an excessive-force case to avoid "stand[ing] trial or fac[ing] the other burdens of litigation," *Ashcroft* v. *Iqbal*, 556 U.S. 662, 672 (2009) (citation omitted), because even if the officer's use of force is objectively reasonable, he can be sued on another theory—that he should have done something differently earlier in the process. According to the Ninth Circuit, all the plaintiff needs "to justify an *Alexander* instruction" is to provide some "evidence to show that

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[2] At least one circuit has approved a provocation theory that does not even require the police to commit an initial constitutional violation. See *Jiron* v. *City of Lakewood*, 392 F.3d 410, 415 (10th Cir. 2004) (stating that a police shooting can be found unreasonable if the "reckless or deliberate [police] conduct during the seizure unreasonably created the need to use such force") (citation omitted). That approach has all of the problems of the Ninth Circuit's doctrine, with the added problem that it imposes Fourth Amendment liability without any constitutional violation at all.

the officer's actions were excessive and unreasonable, and that these actions caused an escalation that led to the shooting." *Duran* v. *City of Maywood*, 221 F.3d 1127, 1131 (2000) (per curiam). And because the provocation question is so open-ended and fact-specific, it is very difficult for officers to obtain summary judgment in an excessive-force case. See, *e.g.*, *Sheehan*, 743 F.3d at 1229-1230 (finding "triable issues of fact as to whether the shooting was unreasonable on a provocation theory" even though "the officers' use of deadly force" was "reasonable" at "the moment of the shooting"); *Espinosa*, 598 F.3d at 538-539 (finding "genuine issues of fact regarding whether the officers intentionally or recklessly provoked a confrontation"); *Alexander*, 29 F.3d at 1366 (denying summary judgment on a claim that the officers acted unreasonably in "creating the situation which caused [the suspect] to take the actions he did").

4. This is not to say that courts and officers should be blind to the events that lead to a use of force. The objective reasonableness test accounts for "the facts and circumstances of each particular case," *Graham*, 490 U.S. at 396, including "what the officer knew at the time" he decided to use force, *Kingsley*, 135 S. Ct. at 2473; see *Plumhoff*, 134 S. Ct. at 2023 (The "crucial question" is "whether the official acted reasonably in the particular circumstances that he or she faced."). But consideration of the facts and circumstances leading up to a use of force in evaluating the reasonableness of that action is different from using a prior unreasonable decision to impose liability for a reasonable use of force.

In this case, for example, the officers were in a backyard looking for a wanted parolee whom they

believed to be armed and dangerous; they had cleared the sheds and thought the man might be hiding in the shack; and when they opened the door to the shack, they were confronted by a man with a gun. Those were the "facts and circumstances" (*Graham*, 490 U.S. at 397) relevant to whether the use of force was reasonable. That the officers had entered the shack without a warrant does not alter the danger that the officers then confronted—an immediate threat that justified the use of deadly force. Acknowledging the relevance of some earlier events, including in some cases the actions of police, in analyzing the reasonableness of the use of force is quite different from blaming police for the need to use force at all.

## II. THE NINTH CIRCUIT ERRED IN CONCLUDING THAT THE OFFICERS' WARRANTLESS ENTRY INTO THE SHACK PROXIMATELY CAUSED RESPONDENTS' INJURIES FROM THE SHOOTING

The Ninth Circuit also erred in its alternative proximate-causation holding.

### A. Under Tort-Law Causation Principles, Officers Are Liable For Injuries They Proximately Caused Unless A Superseding Cause Intervenes

1. This is an action under 42 U.S.C. 1983 brought against state officers for violating the Constitution. Section 1983 "creates a species of tort liability," and the "common law of torts" helps define "the elements of damages and the prerequisites for their recovery." *Heck* v. *Humphrey*, 512 U.S. 477, 483 (1994) (citations omitted). Causation is a necessary element of a constitutional-tort claim under Section 1983. See *Monroe* v. *Pape*, 365 U.S. 167, 187 (1961) (Section 1983 is "read against the background of tort liability that makes a man

responsible for the natural consequences of his actions."); see also *Malley* v. *Briggs*, 475 U.S. 335, 344 n.7 (1986); *Hector* v. *Watt*, 235 F.3d 154, 162 (3d Cir. 2001) (Nygaard, J., concurring).

2. In order to hold a person liable in tort for an injury, his actions must have proximately caused that injury. Proximate cause "refers to the basic requirement" of a "direct relation between the injury asserted and the injurious conduct alleged." *Paroline* v. *United States*, 134 S. Ct. 1710, 1719 (2014) (citations omitted). "Injuries have countless causes, and not all should give rise to legal liability." *CSX Transp., Inc.* v. *McBride*, 564 U.S. 685, 692 (2011). "[T]he proximate-cause requirement generally bars suits for alleged harm that is 'too remote' from the defendant's unlawful conduct." *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 134 S. Ct. 1377, 1390 (2014). "Life is too short to pursue every event to its most remote, 'but-for,' consequences, and the doctrine of proximate cause provides a rough guide for courts in cutting off otherwise endless chains of cause-and-effect." *Pacific Operators Offshore, LLP* v. *Valladolid*, 132 S. Ct. 680, 692 (2012) (Scalia, J., concurring in part and concurring in the judgment).

Proximate cause is often explained "in terms of foreseeability or the scope of the risk created by the predicate conduct." *Paroline*, 134 S. Ct. at 1719; see 1 Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 29, at 493 (2010) (Third Restatement); 2 Restatement (Second) of Torts § 435, at 449 (1965) (Second Restatement). Foreseeability is not a mathematical probability, but a question of the "natural and probable risks that a reasonable person would likely take into account in guiding her practical

conduct." *In re Signal Int'l, LLC*, 579 F.3d 478, 491-492 (5th Cir. 2009) (internal quotation marks omitted); see, *e.g.*, *Milwaukee & Saint Paul Ry. Co.* v. *Kellogg*, 94 U.S. 469, 475 (1877). As a general matter, "[a]n actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious." Third Restatement § 29, at 493.

Even if a harm is foreseeable, the original actor is not liable for that harm when another act intervenes and the intervening act can be considered a "superseding cause." Second Restatement §§ 440-442, at 465-468; see Third Restatement § 34, at 569. Whether an intervening act supersedes the original tortious conduct depends on a variety of factors, including whether that act and the harm it caused was foreseeable and expected, or whether the intervening act is "unforeseeable, unusual, or highly culpable." Third Restatement § 34, cmt. e, at 572-573; see Second Restatement § 442, at 467-468 (setting out factors relevant to whether an intervening force qualifies as a superseding cause).

3. Because the concepts of proximate and superseding causes represent a judgment that only certain causes should result in legal liability, courts applying those doctrines in constitutional-tort cases should account for the legal rules defining the substantive right in question, as well as the rules of qualified immunity and the principle that "each Government official, his or her title notwithstanding, is only liable for his or her own misconduct." *Iqbal*, 556 U.S. at 677. When evaluating proximate cause in the context of actions for constitutional torts, the foreseeability inquiry is not an abstract assessment of what might happen; it looks instead to whether a harmful outcome is the kind associated with the legal rules the official violat-

ed. For example, it may be foreseeable that a police officer's entry into a home without knocking and announcing his presence could in some cases lead to a use of force, see *Hudson* v. *Michigan*, 547 U.S. 586, 594 (2006), but it is generally not foreseeable that entering a home without a warrant would lead to violence. An unannounced entry may lead to surprise, confusion, and a violent response, but the mere absence of a warrant need not have that effect. Further, mere foreseeability of the *potential* need for force is not enough to establish proximate causation, because a potential need for force exists in almost every police encounter.

Actions taken by the targets of the police activity may well constitute superseding causes. Society generally expects a person confronted by a uniformed police officer to follow the officer's instructions rather than violently resisting. See *Hundley* v. *District of Columbia*, 494 F.3d 1097, 1104-1105 (D.C. Cir. 2007) ("[I]t is not ordinarily reasonable to foresee that a citizen will react to a police stop by attacking the detaining officer[.] * * * [C]itizens have a duty to obey a police officer's orders, and officers are entitled to assume that citizens will comply with their orders."). For example, if police officers unlawfully enter a home to effect an arrest, then identify themselves to the occupant and attempt to arrest him, the occupant's decision to grab a gun and shoot at the officers would be a superseding cause that limits the officers' liability. See *Bodine* v. *Warwick*, 72 F.3d 393, 400-401 (3d Cir. 1995) (Alito, J.). Or if a person who stole a car and was fleeing from the police voluntarily crashed into a police roadblock rather than stopping, the person's decision to hit the roadblock would be a super-

seding cause that cut off police liability. See *Brower* v. *County of Inyo*, 489 U.S. 593, 599 (1989). This is not to say that the police could never be liable for damages from violence that resulted from an earlier clearly established constitutional violation, but only that such liability should be rare.

### B. The Warrantless Entry In This Case Did Not Proximately Cause Respondents' Injuries From The Shooting

The court of appeals concluded that Deputy Conley and Deputy Pederson "are liable for the shooting under basic notions of proximate cause." Pet. App. 24a. The court reasoned that "the situation in this case, where Mendez was holding a gun when the officers barged into the shack unannounced, was reasonably foreseeable." *Id.* at 25a. That was error. Even assuming that the warrantless entry into the shack violated respondents' Fourth Amendment rights, and that the violation was clearly established, the warrantless entry did not proximately cause the shooting. If anything, it was the failure to knock and announce, which was not a clearly established violation of the Fourth Amendment, that proximately caused it.

The causation analysis here proceeds from the assumption that the officers did not violate the Constitution in their decision to shoot respondents, and so the only potential violation of respondents' constitutional rights that could be a basis for damages is the unlawful entry. Pet. App. 22a, 25a. With respect to that entry, although the court of appeals concluded that the officers erred both in entering the shack without a warrant and in failing to knock and announce their presence, the court concluded that only the first error could be a basis for personal liability because the

officers had qualified immunity for the second error. *Id.* at 18a-22a. Accordingly, the question is whether the officers' decision to enter the shack *without a warrant* proximately caused respondents' injuries from the shooting. See *id.* at 22a.

The court of appeals' conclusion that the warrantless entry was the proximate cause of respondents' injuries fails on the court's own analysis of the cause of the shooting. That is because the court found that the failure to knock and announce—not the warrantless entry—was the reason for the shooting. According to the court, "an announcement that the police were entering the shack would almost certainly have ensured that Mendez was not holding his BB gun when the officers opened the door. Had this procedure been followed, [respondents] would not have been shot." Pet. App. 21a-22a. The court found the shooting to be a reasonably foreseeable consequence of the entry because "the officers *barged into the shack unannounced*," *id.* at 25a (emphasis added), not because the officers lacked a warrant.[3]

The warrantless entry alone could not have proximately caused the injuries from the shooting, because a warrantless entry, coupled with a knock and announcement, would almost certainly have led Mendez to put away the BB gun before opening the door to the

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[3] This is not to say that it is reasonably foreseeable that any failure to knock and announce will lead to violence. In many situations, the police are not required to announce their presence. See *Richards* v. *Wisconsin*, 520 U.S. 385, 395-396 (1997); *Wilson* v. *Arkansas*, 514 U.S. 927, 934-936 (1995). And even when they are, other factors are relevant to the causation analysis, such as whether the individuals inside a home saw the police outside, or whether the police identified themselves after entering the home.

officers. And since it was not clearly established that the officers had to knock and announce in this situation, Pet. App. 18a, they cannot be held liable for any resulting injuries. That is what qualified immunity means. See *Harlow*, 457 U.S. at 818; see also *Bodine*, 72 F.3d at 400 (officers "certainly would not be liable for harm that was caused by their non-tortious, as opposed to their tortious, 'conduct,' such as the use of reasonable force to arrest [the suspect]").

The Ninth Circuit's decision essentially substituted "but-for" causation for proximate cause. For an unlawful entry, the entry would be the but-for cause of everything that follows during the interaction with police, at least until the police action has concluded. Here, even if the warrantless entry was a but-for cause of the injuries from the shooting, it was not the proximate cause. While it is true that the officers would not have fired if they had not entered, if the officers had obtained a warrant it would not have appreciably reduced the danger presented by the unannounced entry into the shack. That is, it was only the "unannounced" entry, Pet. App. 25a, that proximately caused the shooting. In relying on but-for causation, the Ninth Circuit confused a necessary condition for tort liability with a sufficient one.[4]

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[4] Mendez's pointing a gun towards the officers also may well be a superseding cause that would separately preclude liability for the shooting. However, because the court of appeals erred in concluding that the warrantless entry proximately caused the shooting, it is unnecessary for the Court to consider this issue.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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